

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition No.196 of 2015
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JUDGMENT:

This Civil Revision Petition by the unsuccessful defendants/petitioners is directed against the order dated 12.09.2014 of the learned Principal Junior Civil Judge, Kakinada passed in I.A.no.1063 of 2014 in O.S.no.154 of 2012 filed under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 for appointment of an Advocate Commissioner to note down the physical features and localize the schedule property of the defendants with reference to their respective documents.

2. I have heard the submissions of the learned counsel for the petitioners/defendants ('the defendants', for brevity) and the learned counsel for the respondent/plaintiff ('the plaintiff', for brevity). I have perused the material record.

3. The introductory facts, in brief, are as follows:

The plaintiff brought the suit for perpetual injunction in respect of vacant site of 435.5 square yards in Sy. No.21, zeroyathi dry, Sarpavaram Gram Panchayat and village of Kakinada Rural Mandal of East Godavari District, more fully described in the schedule annexed to the plaint. The defendant is resisting the suit.

3.1 The case of the defendants in support of the request for appointment of a Commissioner for the aforesaid purpose, in brief, is this: "The plaintiff had filed the suit alleging that he is in possession of the plaint schedule property of an extent of Ac.0.09 cents having purchased it under a possessory sale agreement-cum-General Power of Attorney from Koppiseti Sathiraju. In the said possessory agreement, the plaint schedule property was shown as a vacant site. The defendants have given the details of the property in the written statement. If an Advocate Commissioner is appointed and the properties are localized, the true facts would come to light. Further, on one

hand, the plaintiff is alleging that the plaint schedule property is a vacant site; but, on the other, the 2nd defendant is stating that his father had purchased Ac.0.09 cents long time back from Koppiseti Sathiraju and had developed Jasmine Garden and had constructed a tiled house; and that the 2nd defendant and his father are in possession since 1979. Hence, in order to prove the correctness or otherwise of the contentions of the parties, it is necessary to appoint an Advocate Commissioner.”

3.2 *Per contra*, the case of the plaintiff as stated in the counter affidavit is as under: “The averments in the affidavit of the 2nd defendant are untenable. In a suit for perpetual injunction, an advocate-Commissioner cannot be appointed for localization of the property. Appointing a Commissioner for the said purpose would amount to permitting the defendants to gather evidence. There is no dispute about the identity of the property. The plaintiff is relying upon a registered document to prove his title and possession. Hence, there is no need for localization of the property. Therefore, the petition is not maintainable and is liable to be dismissed.”

3.3 On merits, the trial Court, by the impugned order, had dismissed the application of the defendants *inter alia* holding that there is no dispute with regard to the identity of the property; and that existence of Jasmine Garden and the house in the schedule property as pleaded by the defendants is in dispute; and that the burden of proof in the suit is on the plaintiff; and that the said legal burden never shifts to the defendants during the course of trial; and that there is no necessity to appoint a Commissioner in a suit for injunction, that too, to ascertain whether the suit schedule property is a vacant site or not; and that the said facts can as well be established by filing photographs.

4. The learned counsel for the defendants while reiterating their stand in the interlocutory application would submit that if not for localization, at least for noting down the physical features of the property, a Commissioner can be appointed; and that in view of the contentions of the plaintiff that the suit schedule property is a vacant site and the rival contentions of the defendants

that they have raised a Jasmine Garden and that their father had constructed a house in the property and that the 2nd defendant and his father are in possession of the said house since 1979, it is just and fair to appoint a Commissioner to note down the physical features; and that the report filed by the Commissioner after noting down the physical features would be of great help to the Court in determining the true facts; and that even if the photographs are filed, it would be difficult to prove the identity of the property by means of mere photographs; and that by mere filing of photographs of the property, it is difficult to establish that the photographs pertain to the property in question; and that, therefore, a Commissioner can be appointed for the limited purpose of noting down the physical features of the plaint schedule property.

5. On the other hand, the learned counsel for the plaintiff while reiterating the contentions of the plaintiff would submit that it is for the plaintiff to prove his pleaded case in a suit for perpetual injunction; and that on failure of the plaintiff to prove the material facts on which the plaintiff has relied upon to establish his pleaded case, he would fail to succeed in the suit; and that the legal burden is not the defendant; and hence, there is no onus on the defendants to disprove the case of the plaintiff by seeking appointment of a Commissioner; and that in a suit for perpetual injunction, a Commissioner cannot be appointed for gathering evidence; and that there is no necessity to appoint an Advocate Commissioner; and that the petition is not maintainable and is liable to be dismissed.

6. I have bestowed my attention to the facts and submissions.

7. A plain perusal of the pleadings would disclose that the plaintiff's case is that the plaint schedule property is a vacant zeroithi dry land. On the other hand, the case of the defendants is that they have raised a Jasmin Garden and that a tiled house was also constructed by the father of the 2nd defendants and that the same is in their possession since the year 1979. Therefore, one of the vital/material aspects to be incidentally determined in the *lis* is as to whether the plaint schedule site is a vacant site as contended

by the plaintiff or whether a Jasmine Garden and house are in existence in the plaint schedule property as being contended by the defendants. If a Commissioner is appointed to note down only the physical features, the said material facts in dispute can be ascertained with certainty. Further, if a commissioner so appointed files a report after noting down the physical features the same obviates the necessity of adducing voluminous oral evidence. There is no hard and fast rule or a settled proposition of law that an advocate commissioner cannot at all be appointed for any purpose in a suit for perpetual injunction; and it cannot be laid down as a rule of thumb that in no suit for perpetual injunction, an advocate Commissioner can be appointed; however, the law is well settled that a Commissioner cannot be appointed to find out as to who amongst the parties is in possession of the property as it is the function of the Court to decide the issue as to who amongst the parties is in possession of the property; and the said judicial function cannot be delegated to an advocate commissioner. Under law, in any suit in which the Court deems local investigation is requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to an advocate or any competent person and direct to make such investigation and to report to the Court. Therefore, in the well-considered view of this Court, the revision petition is having acceptable merit in so far as the limited request in regard to appointment of an advocate-commissioner for noting down the physical features of the plaint schedule land/property. Therefore, the order impugned warrants interference in the facts and circumstances of the case.

8. In the result, the Civil Revision petition is allowed and the impugned order is set aside. As a sequel, I.A.no.1063 of 2014 is allowed in part directing the trial Court to appoint an Advocate Commissioner from the panel of Advocates being maintained in the Court for the limited purpose of noting down the physical features of the plaint schedule property and filing his report. The trial Court shall, as directed in this order, do the needful as expeditiously as possible and preferably, within a period of one month from the date of receipt of a copy of this order.

09th March, 2016
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M.SEETHARAMA MURTI, J